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No. 84-1704, No. 84-1700, and No. 84-1640

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARSHALL MECHANIK, Petitioner
v
UNITED STATES OF AMERICA, Respondent

JEROME OTTO LILL, Petitioner
v
UNITED STATES OF AMERICA, Respondent

UNITED STATES OF AMERICA, Petitioner
v
MARSHALL MECHANIK, ET AL, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the joint testimony of two drug enforcement agents before a grand jury, in flagrant violation of Rule 6(d) of the Federal Rules of Criminal Procedure, requires that the entirety of a superseding indictment returned by that grand jury after such joint testimony be dismissed; or,

2. Whether the Court of Appeals erred in dismissing only one count of a multi-count indictment when the court of appeals held that the tandem presentation of the testimony of two material witnesses before the grand jury violated Federal Rule of Criminal Procedure 6(d), and that violations of Rule 6(d) require the dismissal of an indictment.

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BRIEF OF PETITIONERS

This consolidated Brief on the Merits is filed on behalf of Marshall Mechanik and Jerome Otto Lill.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals on rehearing en banc is reported at 756 F.2d 994. The panel opinion is reported at 735 F.2d 136. The opinion of the district court is reported at 511 F. Supp. 50. Each parties' Petition for Writ of Certiorari included an appendix reprinting the opinions below.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Marshall Mechanik's Petition for Writ of Certiorari was mailed to the Court on April 29, 1985 within sixty days of the March 1, 1985, Opinion and Judgment of the Court of Appeals for the Fourth Circuit. Jerome Otto Lill's Petition for Writ of Certiorari was filed on April 30, 1985, within sixty days of the March 1, 1985, Opinion and Judgment of the Court of Appeals for the Fourth Circuit. Certiorari was granted on both Petitions on June 17, 1985.

RULES INVOLVED

Rule 6(d) of the Federal Rules of Criminal Procedure provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

STATEMENT OF THE CASE

On June 6, 1979, a DC-6 aircraft containing marijuana crash landed at Kanawha County airport, outside Charleston, West Virginia. The investigation resulting

from this event originally ended on June 14, 1979, in a twelve-count, nine-defendant indictment. (J.A. pages 9-18).

On August 10, 1979, after four days additional testimony, the grand jury returned a superseding twelve-count, twelve defendant indictment. (J.A. pages 19-33). On that day, and prior to issuance of the superseding indictment, two Drug Enforcement Administration (DEA) agents, Jerry Rinehart and Randolph James, were sworn in simultaneously by the prosecuting attorney and testified together before the grand jury for one hour. Their testimony intertwined, with one witness supplementing the other, and each making references to what "we" did, knew or observed. In addition, the prosecutor assisting the grand jury substantively elaborated on the testimony of the agents, using the collective "we". (J.A. pages 110-150).

Prior to trial, an omnibus motion was filed on behalf of the petitioners, requesting that the Government provide a list of all persons who appeared before the grand jury, for the express purpose of determining whether any unauthorized persons had appeared before the grand jury in violation of Fed. R. Crim. P., Rule 6(d). (J.A. page 45). In response to this specific pre-trial request, the Government denied that any unauthorized person had appeared before the grand jury, (J.A. page 46), and denied that any impropriety had occurred.[1] The petitioners also moved to dismiss the indictment, alleging grand jury impropriety. The district court denied these pretrial motions, and the trial commenced.

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[1]The Goverment conceded during oral argument before the panel in the Fourth Circuit on February 9, 1984, that the prosecution had denied any irregularity in the grand jury proceeding.

During the second week of trial, defense counsel discovered, upon receipt of material provided pursuant to the Jenck's Act, 18 USC §3500, that Rinehart and James had appeared and testified simultaneously before the grand jury. Counsel immediately moved for dismissal of the indictment (J.A. pages 47, 48). This motion was denied, based on the trial court's determination that there was no violation of Rule 6(d). (J.A. pages 49-51). The petitioners sought, through interlocutory appeal, a review of this determination. On April 10, 1980, the petition for review was denied as premature. On May 22, after the trial had been transferred to a different judge,[2] the petitioners renewed their motion to dismiss the indictment due to the violation of Rule 6(d) (J.A. page 52). On August 15, 1980, after the jury verdict was entered,[3] the district court issued a lengthy opinion concluding that the joint appearance of two DEA witnesses before the grand jury was a clear violation of Rule 6(d). *United States v. Lill, et al.*, 511 F. Supp. 50 (S.D. W. Va., 1980). However, the district court denied the motion to dismiss the indictment.

Despite the conclusion that Rule 6(d) was clearly violated, and despite the recognition that "federal decisions which have addressed [the question of whether the presence of an unauthorized person before the grand jury is *per se* prejudicial] are, in the main, uniform in adhering to the *per se* rule,"[4] the district court determined not to follow this straight line of precedent. The district

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[2]The original trial judge suffered a heart attack during the proceedings. (J.A. pages)

[3]Petitioner Marshall Mechanik was convicted of conspiracy and of traveling interstate in furtherance of an unlawful business enterprise. Petitioner Jerome Otto Lill was convicted of conspiracy, of importing marijuana, and of possession with intent to distribute marijuana. (J.A. pages).

[4]*United States v. Lill*, et al., 51 F. Supp. at 58.

court did, however, recite the improprieties and probable results[5] of the Government's flagrant violation of rule 6(d); a violation which, the district court found, would have mandated dismissal at pre or early trial stages.[6] In other words, had the Government not failed to disclose what was asked of them or had the original trial judge ruled correctly when the issue was first presented, the indictment would have been dismissed.

A panel of the Court of Appeals reversed the petitioners' conspiracy convictions because of the Rule 6(d) violation. However, the panel affirmed the other convictions because the substantive counts in the superseding indictment were identical to substantive counts in the original indictment, and the district court had determined from a meticulous examination of the evidence presented, that the grand jury had a valid basis for the substantive charges indpendent of the unauthorized joint appearance of the DEA agents. *United States v. Mechanik, et al.*, 735 F.2d 136 (4th Cir. 1984).

The case was reheard en banc upon the Government's motion. The en banc court affirmed the panel's determinations and adopted the panel's reasoning. *United States v. Mechanik, et al.*, 756 F.2d 994 (4th Cir. 1985).

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[5]The district court rejected the Government's contention that, due to the complexity of the charges and evidence involved, the joint testimony of two DEA agents was required for an effective presentation of the case. *United States v. Lill*, 511 F. Supp. at 57. The district court found that the joint testimony tended to be detrimental to the jurors' ability to assess the credibility and personal knowledge of the two agents. *Id.*, at 56. And, the district court determined that an added persuasiveness resulted from the joint presentation of testimony, thus undermining one of the policy reasons underlying Rule 6(d). *Id.*, at 57.

[6]*United States v. Lill*, et al., 511 F. Supp. at 61.

SUMMARY OF ARGUMENT

The government violated Federal Rule of Criminal Procedure 6(d), by presenting the tandem testimony of two drug enforcement agents to the grand jury. It is necessary that the grand jury be allowed extraordinary investigative leeway in order to properly perform its dual function. The grand jury is dependent upon the prosecutor for assistance. Strict prosecutorial compliance with Rule 6 is necessary to insure that the broad investigatory powers allowed the grand jury are not abused by the executive branch.

Historically, when the prosecution has violated the rule in a manner that threatened the integrity of the grand jury, the federal courts have enforced Rule 6(d) by dismissing the entire indictment without requiring a showing of prejudice. The court of appeals in this case endorsed that rule as to one count but erred in failing to dismiss the entire indictment. The judicial inquiry conducted by the district court into the substance of the evidence presented to the grand jury to determine whether or not the grand jury had a probable cause basis to issue the second indictment was error. Even if such an analysis was not prohibited, but was required, the court of appeals erred because the testimony serving as the probable cause basis for the charges which were affirmed was the same tainted testimony that served as the probable cause basis for the charges dismissed because of the rule violation.

Accordingly, the entire indictment must be dismissed.

ARGUMENT

THE INDEPENDENCE AND INTEGRITY OF THE GRAND JURY MANDATES THE DISMISSAL OF THE ENTIRE INDICTMENT FOR THE GOVERNMENT'S EGREGIOUS VIOLATION OF THE ONLY RULE GOVERNING GRAND JURY PROCEDURE

It is undisputed that Rule 6(d) was violated in this case. The Petitioners here have contended it, and renewed this contention from its earliest discovery. The trial judge held there was a violation. *United States v. Lill*, 511 F.Supp. at 58. Indeed, even the Government has acknowledged the violation.[7]

The question before this Court, then, concerns the proper remedy to employ whan a calculated, substantive, and flagrant violation of Rule 6(d) occurs by the Government. It is clear from the history and language of Rule 6(d) that the only appropriate remedy for its violation is dismissal of the entirety of the indictment.

A. THE STRICT ENFORCEMENT OF FEDERAL RULE OF CRIMINAL PROCEDURE 6 IS NECESSARY TO PROTECT THE INTEGRITY OF THE GRAND JURY AS AN INDEPENDENT INVESTIGATORY BODY.

The history of the grand jury is rooted in the common and civil law, extending from Periclesean Athens through pre-Norman England to the Assize at Clarendon promulgated by Henry II in 1166. In its origin, the grand jury was a device which authorized the central government to investigate crimes; it benefited the government rather than the suspect. The grand jury became a mechanism for charging individuals with crimes, then, as the petit jury system developed, the grand jury evolved into a mechanism for protecting the individual from govern-

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[7]See the Government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, P. 9 (No. 84-1640)

ment abuse. As a right of individual liberty, the grand jury was first mentioned in America in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the Colony of New York. Included from the first in James Madison's introduced draft of the bill of Rights, the grand jury provision elicited no recorded debate and no opposition. It now resides in the Fifth Amendment to the Constitution of the United States.[8]

The grand jury occupies a high place as an instrument of justice unique to our criminal justice system. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *Costello v. United States*, 350 U.S. 359 (1956). In *Costello*, this Court eloquently described the grand jury:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes .... Despite its broad power to institute criminal proceedings, the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring

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[8]See generally, Morse, "A Survey of the Grand Jury System," 10 Ore. L. Rev. 101 (1931), Also, "The Grand Jury", Edwards, (1906).

> charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury as convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. [*Costello v. United States*,350 U.S. 359 (1956).]

As the body entrusted to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution by determining if there is probable cause to believe that a crime has been committed, the grand jury has always been extended extraordinary powers of investigation, generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. *United States v. Calandra*, 414 U.S. 338 (1974); *Blair v. United States*, 250 U.S. 273 (1919). The broad, virtually unrestrained grand jury powers are considered necessary to permit that body to carry out its dual function by allowing thorough and effective investigations. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Consistent with the paramount necessity for broad investigatory powers, only one procedural rule addresses grand jury practice, Federal Rule of Criminal Procedure 6. This rule of procedure, particularly subsection (d), enhances rather than limits the functioning of the grand jury by insuring secrecy and protecting the independence of the grand jury by protecting the grand jury from undue influence. *United States v. Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983).

The grand jury consists of ordinary citizens, generally with little knowledge of the intricacies or complexities of either substantive or procedural criminal law. Particularly in modern times, the grand jury requires the assistance of the prosecutor to properly perform its dual function. As recognized in *Sells Engineering*, the prosecutor assists in securing the evidence and witnesses required, and advises

the lay jury on the applicable law. The purpose of the grand jury, however, requires that it remain free to operate independently of the prosecuting attorney and the court. *Stirone v. United States*, 361 U.S. 212 (1960). Rule 6 recognizes these potentially inconsistent principles and protects against the potential for abuse of the grand jury's extraordinary investigative power by the rare representative of the executive branch who is unwilling to properly perform the prosecutorial functions. Not unduly burdensome so as to encumber either the prosecutor or the grand jury in their proper respective roles, compliance with Rule 6(d) insures the crucial balance necessary to allow the grand jury the investigative leeway to properly function in our criminal justice system with the assistance of the prosecutor. Indeed, as the grand jury is granted extraordinary powers of investigation, because of the difficulty and importance of the tasks, Rule 6 limits those powers as far as reasonably possible to assure the accomplishment of the tasks. *United States v. Sells Engineering, Inc.*, — U.S. —; 103 S. Ct. at 3143; No. 81-1032 (June 30, 1983).

The grand jury has a protected place in this country's hierarchy of constitutional values. However, to continue to fulfill its function of "protection of citizens against unfounded criminal prosecutions", *Branzburg v. Hayes*, 408 U.S. 665, 686-7 (1972), the integrity of the grand jury system must be maintained free from undue Government influence or usurpation. Congress and the courts have consistently defended the grand jury from unwarranted manipulation.

An unbroken series of cases extending through this countries' constitutional history reveals no case where a court has ever relaxed the stringent preservation of the secrecy and integrity of grand jury proceedings. The cases cited below all reflect the age-old policy that the presence of an unauthorized person in the grand jury room for any significant or deliberate duration of time or purpose mandates dismissal of the entire indictment.[9]

room for any significant or deliberate duration of time or purpose mandates dismissal of the entire indictment.[9]

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[9]*United States v. Edgerton*, 80 F. 374 (D. Mont. 1897) (expert witness remained after testifying and asked questions of another witness); *Latham v. United States*, 226 F.2d 420 (5th Cir. 1915) (unauthorized person was present to record testimony throughout grand jury proceedings); *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953) (deputy marshalls present throughout testimony of prisoner witnesses); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959) (mother of witness present throughout daughter's testimony); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971) (FBI agent called upon by prosecutors to enter grand jury room to play a recording device during testimony of a witness); *United States v. Daneals*, 370 F. Supp. 1289 (W.D. N.Y. 1974) (unauthorized agency regional counsel appeared and advised grand jury); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977) (unauthorized person present throughout as observer and assistant prosecutor); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) (unauthorized person was present throughout testimony of a witness and conducted part of questioning); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (government attorney who testified before a grand jury and then resumed prosecutorial role violated Rule 6(d); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978) (attorney for antitrust division appeared before a grand jury and remained after testifying in violation of Rule 6(d); *United States v. Boyle*, 338 F. Supp. 1028 (D.D.C. 1972) (presence unauthorized person in grand jury room raises presumption of prejudice; however, court refused to dismiss indictment because defendant failed to set forth sufficient facts in support of claim); *United States v. Goldman*, 28 F. 2d 424 (D. Conn. 1928) (presence of a special assistant acting as stenographer was unauthorized); *United States v. Philadelphia RRwy Co.*, 221 F. 683 (E.D. Pa. 1915) (presence of attorneys who were stenographers before grand jury constituted unauthorized personnel); *United States v. Rubin*, 218 F. 245 (D. conn. 1914) (presence of unofficial stenographer taking shorthand before grand jury was unauthorized); *United States v. Heinz*, 177 F. 770 (S.D.N.Y. 1910) (expert accountant in grand jury room to assist in the handling of technical questions with accountant witness was unauthorized — prejudice is presumed in law); *United States v. Newman*, 534 F. Supp. 1113 (S.D.N.Y. 1982) (Government sought to have indictment dismissed without prejudice because unauthorized special assistant in grand jury room); *United States v. Pignatiello*, 582 F. Supp. 251 (D. Colo. 1984) (presence of unsworn SEC attorney required per se dismissal); see also *State v. Frazier*, 252 S.E. 2d 39 W.Va. 1979).

This case authority only serves to reaffirm Congress' clear intent that Rule 6(d) be stringently enforced. The Federal Rules of Criminal Procedure have the force and effect of statutory law, and are binding on the federal courts. *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964). Rule 6(d), which is unambiguous, provides that *only* certain enumerated persons are authorized to be present while the grand jury is in session. Had Congress intended to make the invocation of this rule discretionary, it would have written 6(d) to reflect that intent by broadening its scope with general language. Or, Congress would have indicated that a breach of the rule would not be deemed to "affect the substantial rights" of defendants or that "the court for good cause shown" may excuse a breach. *Cf.* Fed. R. Crim. P. 12(f). However, Rule 6(d) was crafted without any such safety valves. Rather, Congress took great pains in Rule 6(d) to carefully describe those persons authorized to be present in the grand jury room. Thus, Congress' intent was clearly manifested in the plain wording of the Rule.

It is clear that where any substantive violation of Rule 6(d) occurs, dismissal of the indictment is required.

(Footnote continued)
Coblentz v. State, 164 Md. 558, 166 A. 45, 48-49 (1933); *Corbin v. Boardman*, 6 Ariz. App. 426, 433 P.2d 289, 294-296 (1967) (apparent per se rule); *State v. Revere*, 232 La. 184, 94 So. 2d 25, 33-34 (1957); *Commonwealth v. Harris*, 231 Mass. 584, 121 NE 409 (1919); *State v. District Court of First Judicial District*, 220 P.2d 1035, 1051 (Mont. 1950); *State v. Hill*, 88 N.M. 217, 539 P.2d 236, 239-40 (1975); *People v. Minet*, 296 N.Y. 315 (1947); *State v. Johnson*, 214 NW 39, 41 (N. Dak. 1927) (apparent per se rule); *Hammers v. State*, 337 P.2d 1097, 1109-1110- (Okla. Cr. 1959); *Meyer v. Second Judicial District Court* in and for Weber County, 156 P.2d 711, 714 (Utah 1945).

Courts have recognized however, that brief intrusions during which the grand jury proceedings were halted do not require dismissal; See, e.g. *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984), *cert den.* No. 84-5793, Jan. 14, 1985; *United States v. Kaham & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982); *United States v. Rath*, 406 F.2d 757 (6th Cir. 1969), *cert. den.* 394 U.S. 920 (1969); and *United States v. Computer Sciences Corp.* 684 F.2d 1181, *cert. den.* 459 U.S. 1105 (1982).

Ironically, the Government in its Petition agreed that, if dismissal of the indictment is required by violation of Rule 6(d), as the Court of Appeals purported to hold, the indictment in its entirety must be rendered void.[10]

B. PER SE DISMISSAL OF THE ENTIRE INDICTMENT PROVIDES THE MOST EFFECTIVE MECHANISM FOR ENFORCEMENT OF THE PROCEDURAL RULE WITHOUT A REQUIREMENT THAT THE COURT INQUIRE INTO THE EVIDENCE PRESENTED TO THE GRAND JURY FOR DETERMINING WHETHER OR NOT THE RULE VIOLATION TAINTED THE PROBABLE CAUSE FINDING.

The analysis conducted by the trial court and adopted by the court of appeals in declining to apply the per se rule of dismissal to the substantive counts (two, four and ten) of the superseding indictment required a meticulous comparison of the indictments and an actual in depth judicial inquiry into the substantive testimony presented to both grand juries for a determination that there was a probable cause basis for the substantive counts, independent of the tainted testimony, by virtue of their inclusion in the original indictment. The lower court erred in endeavoring to analyze the sufficiency of the evidence presented to the grand jury to determine whether or not the grand jury's probable cause determination was

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[10]Government's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, P. 14, N. 9 (No. 84-1640). See also, *United States v. Fulmer*, 722 F. 2d 1192, 1195 (5th Cir. 1983), where the government conceded that dismissal of a superseding indictment was the proper remedy for a substantive violation of Rule 6(d).

founded on sufficient proof. *Beavers v. Henkel*, 194 U.S. 73 (1904); *Costello v. United States*, 350 U.S. 359 (1956). Such an inquiry frustrates the orderly administration of justice and threatens the independence of the grand jury. The judicial inquiry into the sufficiency of the evidence supporting the grand jury's probable cause finding in this case should not be endorsed by this Court merely because it is the Government, rather than the defendant, who reaps the benefit of such a time consuming exercise in judicial second guessing. Per se dismissal for the egregious rule violation is appropriate because any judicial determination regarding the existence of prejudice requires forbidden inquiry by the court into the historical province of the grand jury.

The above-substantive objection notwithstanding, the procedural impediments to only enforcing Rule 6(d) when a violation results in demonstrable prejudice militate against the adoption of such a rule. Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure*, at 914 (4th Ed. 1974); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978). Which party has the burden of proof? Despite overriding considerations of grand jury secrecy, is the defendant entitled to examine all of the substantive evidence presented to the grand jury to demonstrate prejudice? What is the effect of the Government's pretrial denial of the existence of the rule violation, which, as in this case proves to be false?

On the other hand, the ease of administration of per se dismissal gives the rule meaning without creating an unworkable and burdensome standard.

The long line of precedent applying the pre se rule of dismissal for 6(d) violations recognized and adopted the above considerations, and endorsed the per se rule of dismissal in order to protect against potential prejudice to the grand jury system, rather than focusing on the immeasurable effect of the rule violation on the actual

defendant. *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953); *United States v. Fulmer*, 722 F.2d 1192 (5th Cir. 1983); *Latham v. United States*, 226 F. 420 (5th Cir. 1915); *United States v. Echols*, 542 F.2d 948 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okl. 1977); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978); *United States v. Branniff Airways, Inc.*, 428 F. Fupp. 578 (W.D. Tex. 1977); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971); *United States v. Gold*, 470 F. Supp. 1336 (N.D. I11. 1979); *United States v. Edgerton*, 80 F. 374 (D. Mont. 1877).

Even if the lower court analysis of the evidence considered by the grand jury was proper, or required, in the instance of a 6(d) violation, it was factually erroneous.

The petitioners Lill and Mechanik were brought to trial on the tainted superseding indictment, and the taint as to all counts is easily demonstrated by reference to the joint testimony. During the tandem testimony of Rinehart and James, the grand jurors were specifically instructed by the prosecutor that the factual basis for overt act (hh) of the conspiracy count also provided the probable cause basis for the charges against Lill in the proposed Counts Two and Four of the superseding indictment. (J.A. pages 132-133). Similarly, the prosecutor instructed the grand jury that the factual basis for overt act (dd) of the conspiracy count also provided the probable cause basis for Count Ten against Mechanik. (J.A. page 129) Additionally, the charging language of the overt acts (dd) and (hh) of the dismissed conspiracy Count One was virtually identical to the changing language of substantive Counts Ten, Two and Four respectively.

Following dismissal, the government may be free to properly present the case to a grand jury, reindict, and retry the petitioners. The probable short-lived "windfall" to the petitioners realized by the application of per se

dismissal is far outweighed by the societal benefits derived from the historically uniform application of a Federal Rule which preserves the integrity of the grand jury and benefits the entire criminal justice system.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it fails to overturn the petitioners' convictions on the substantive counts of the indictment.

RESPECTFULLY SUBMITTED

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